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FILED
AUG 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-88

In The

Supreme Court of the United States

October Term, 1997

RICHARD E. FLESHMAN,

Petitioner,

v.

TOGO D. WEST, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL ORGANIZATION OF VETERANS' ADVOCATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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August 17, 1998

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16 pp

QUESTION PRESENTED

Whether Congressional intent, as demonstrated by the statutory scheme regarding the administration of veterans' benefits, supports the interpretive rule recognized by this Court in *Brown v. Gardner*, 513 U.S. 115 (1994), that any ambiguity in the veterans statutes must be resolved in favor of the veteran, and points to error in the Federal Circuit's ruling that interpretation of veterans statutes by the Secretary of Veterans Affairs is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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OPINIONS BELOW[1]

The opinion of the Court of Appeals is reported at 138 F.3d 1429 and is reproduced in the Appendix of the Petition for a Writ of Certiorari (Pet.App.) beginning at page 1a. The opinion of the Court of Veterans Appeals is reported at 9 Vet.App. 548 and is reprinted at Pet.App. 12a-22a. The opinion of the Board of Veterans' Appeals is unreported and is reprinted at Pet.App. 23a-33a.

STATUTES AND REGULATIONS INVOLVED

38 U.S.C. § 1111. Presumption of sound condition.

> For the purposes of section 1110 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

38 U.S.C. § 1112. Presumptions relating to certain diseases and disabilities.

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[1] Pursuant to Rule 37.6, counsel for amicus hereby notifies the Court that counsel for neither party authored the following brief, either in whole or in part, and that no person or entity other than the amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

(a) For the purposes of section 1110 of this title, and subject to the provisions of section 1113 of this title, in the case of any veteran who served for ninety days or more during a period of war –

(1) a chronic disease becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service;

(2) a tropical disease, and the resultant disorders or disease originating because of therapy, administered in connection with such diseases, or as a preventative thereof, becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service, or at a time when standard of accepted treatises indicate that the incubation period thereof commenced during such service;

(3) active tuberculous disease developing in a 10 percent degree of disability or more within three years from the date of separation from such service;

(4) multiple sclerosis developing a 10 percent degree of disability or more within seven years from the date of separation from such service;

(5) Hansen's disease developing a 10 percent degree of disability or more within three years from the date of separation from such service;

shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disease during the period of service.

38 U.S.C. § 1137. Wartime presumptions for certain veterans.

For the purposes of this subchapter and subchapter V of this chapter and notwithstanding the provisions of sections 1132 and 1133 of this subchapter, the provisions of sections 1111, 1112, and 1113 of this chapter shall be applicable in the case of any veteran who served in the active military, naval, or air service after December 31, 1946.

38 U.S.C. § 1153. Aggravation.

A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

38 U.S.C. § 1154(b). Consideration to be accorded time, place, and circumstances of service.

In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of

service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service-connection in each case shall be recorded in full.

38 U.S.C. § 5107. Burden of proof; benefit of the doubt.

(a) Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

(b) When, after consideration of all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be

given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden specified in subsection (a) of this section.

STATEMENT OF THE CASE

The Petitioner has fully laid out the Statement of the Case in his Petition for a Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

The National Organization of Veterans' Advocates ("NOVA") seeks to provide effective representation to anyone seeking benefits through the federal veterans' benefits system, with a focus on those who seek judicial review of veterans' benefits decisions. The 106 members of NOVA include both attorneys and non-attorneys, both veterans and people who have never served in the armed forces but nonetheless care deeply about the treatment of veterans in this country. All the members of NOVA are admitted to practice at the Court of Veterans Appeals.

NOVA takes many different approaches in its attempt to obtain effective representation for all veterans. For example, NOVA runs an advocate referral system, which connects veterans who want representation at the Court of Veterans Appeals with qualified attorneys who are willing to help them. NOVA also organizes and hosts two seminars annually, at which representatives from all over the country meet to learn about and discuss a wide variety of veterans' law issues. Throughout the year,

through newsletters, mailing lists, and phone calls, the members of NOVA actively research, study, and discuss veterans' law. Finally, NOVA files many amicus briefs each year, at both the United States Court of Veterans Appeals and the United States Court of Appeals for the Federal Circuit.

NOVA files this amicus brief because the resolution of the issue in this case, the proper standard for interpretation of statutes regarding veterans' benefits, will have a profound and far-reaching effect on all veterans applying for benefits administered under the statutory scheme provided by Congress. Consent has been granted for this brief.

SUMMARY OF THE ARGUMENT

The rule of statutory interpretation propounded in *Brown v. Gardner* that ambiguity in veterans statues must be resolved in favor of the veteran is consistent not only with this Court's previous decisions, but also with the general intent of the veterans' benefits statutory scheme as designed by Congress. That statutory scheme is designed to favor the veteran whenever possible, as is demonstrated by three different types of statutory provisions: the principle that all doubt is to be resolved in favor of the veteran; the Department of Veterans Affairs' statutorily mandated duty to assist the veteran in developing his claim; and the presence in the statutes of strong evidentiary presumptions in favor of the veteran.

ARGUMENT

This Court has repeatedly warned that " '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law[.]' " *United States Nat. Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)). In general, when interpreting a statute " 'the court will not merely look to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give it such construction as will carry into execution the will of the legislature[.]' " *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)). An examination of "the whole law" of veterans' benefits and its "objects and policy" clearly shows that when courts interpret veterans' benefits statutes, interpretive doubt should be resolved in favor of the veteran, for the substance of veterans' statutes is devoted to furthering the causes of veterans in a decidedly nonadversarial way.

For example, Congress has stipulated that when making decisions about whether a veteran is entitled to benefits, when the evidence is in equipoise, the benefit of the doubt is to be given to the veteran. 38 U.S.C. § 5107(b) (1998). The Court of Veterans Appeals has stated that the benefit of the doubt doctrine is "at the farthest end of the spectrum" of forms of standards of proof. *Gilbert v. Derwinski*, 1 Vet.App. 49, 54 (1990). For a veteran to prevail on a claim under this doctrine, there need be only an

"approximate balance of positive and negative evidence"; indeed, there must actually be a preponderance of evidence *against* the veteran's claim if benefits are to be denied. *Id.* "This unique standard of proof is in keeping with the high esteem in which our nation holds those who have served in the Armed Services. . . . By tradition and by statute, the benefit of the doubt belongs to the veteran." *Id. See, e.g., Alemany v. Brown*, 9 Vet.App. 518, 519-20 (1996); *Hayes v. Brown*, 9 Vet.App. 67, 74 (1996); *Smith v. Brown*, 8 Vet.App. 546, 554 (1996); *Caffrey v. Brown*, 6 Vet.App. 377, 382 (1994); *ZN v. Brown*, 6 Vet.App. 183, 195 (1994); *Ashley v. Brown*, 6 Vet.App. 52, 59 (1993); *Goodsell v. Brown*, 5 Vet.App. 36, 45 (1993). Obviously, the standard of statutory interpretation outlined in *Gardner v. Brown* is consistent with Congress's intent as evidenced by the benefit of the doubt doctrine outlined in § 5107(b).

Similarly, the Secretary of Veterans Affairs has a statutory duty to assist in the development of a claim for veterans' benefits. 38 U.S.C. § 5107(a) (1998); *see* H.R.Rep. No. 100-963, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795 (Congressional statement of VA's duty to "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits"). This duty "arises out of the [Department of Veterans Affairs'] long tradition of *ex parte* proceedings and paternalism toward the veteran." *Connolly v. Derwinski*, 1 Vet.App. 566, 569 (1991).

The duty to assist confers many different responsibilities on the VA. For example, the duty to assist requires the VA to, when appropriate, conduct a thorough, contemporaneous medical examination. *See, e.g., Molloy v. Brown*, 9 Vet.App. 513, 517 (1996); *Perry v. Brown*,

9 Vet.App. 2, 6 (1996); *Suttman v. Brown*, 5 Vet.App. 127, 138 (1993); *Green (Victor) v. Derwinski*, 1 Vet.App. 121, 124 (1991). As well, the VA is required, in certain circumstances, to obtain medical records from either public or private medical facilities. *See, e.g., Sutton v. Brown*, 9 Vet.App. 553, 570 (1996); *Myore v. Brown*, 9 Vet.App. 498, 506 (1996); *Winn v. Brown*, 8 Vet.App. 510, 513-14 (1996); *Gregory v. Brown*, 8 Vet.App. 563, 570 (1996). The duty to assist may also encompass the duty to obtain records from other government agencies, such as the Social Security Administration. *See, e.g., Hayes*, 9 Vet.App. at 73-74; *Shoemaker v. Derwinski*, 3 Vet.App. 248, 253-54 (1992); *Murincsak v. Derwinski*, 2 Vet.App. 363, 373 (1992). In addition, the duty to assist requires the Secretary to read a claimant's claim documents in a liberal manner and to adjudicate of all claims that are reasonably raised by the evidence of record, whether or not those claims are formally claimed in a VA application. *Robinette v. Brown*, 8 Vet.App. 69, 76 (1995); *see EF v. Derwinski*, 1 Vet.App. 324, 326 (1991). The statutory duty to assist, in other words, places a great responsibility on the VA to help a veteran develop his claim.

Finally, Congress's statutory scheme for veterans' benefits includes various strong evidentiary presumptions in favor of granting the veteran's claim for benefits. For example, a veteran is presumed to have been in sound condition when he entered service if no defects were noted at the time of enlistment, absent clear and convincing evidence to the contrary. 38 U.S.C. § 1111 (1998)[2]. The burden of proof on the VA to rebut this

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[2] Although this statute originally applied only to wartime veterans, 38 U.S.C. § 1137 extends the presumption afforded in

presumption is "formidable." *Kinnaman v. Principi*, 4 Vet.App. 20, 27 (1993); *see Crowe v. Brown*, 7 Vet.App. 238, 245 (1994). If a veteran contracts one of a list of certain diseases within certain lengths of time from discharge from service, he is presumed to have incurred that disease in service, even if there is no evidence of such disease during the period of service. 38 U.S.C. § 1112 (1998)[3]. A veteran who served in Vietnam during the Vietnam era and who contracts certain diseases is presumed to have contracted those diseases through exposure to Agent Orange, unless there is affirmative evidence that he was never exposed to Agent Orange. 38 U.S.C. § 1116 (1998). Whenever a veteran has a preexisting condition and that condition worsens during service, it is presumed that service aggravated that condition, even in the absence of affirmative evidence of aggravation. 38 U.S.C. § 1153 (1998). And a combat veteran's lay evidence stating that a disease or injury was incurred in service is sufficient to establish service-connection for that disease or injury, absent clear and convincing evidence to the contrary. 38 U.S.C. § 1154(b) (1998). Congress has clearly mandated that evidentiary gaps be resolved to the veteran's advantage in order to enhance the likelihood that benefits will be granted, rather than denied. This is obviously consistent with the rule of interpretation propounded in *Gardner*.

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this statute to any veteran who served in the active military, naval, or air service after December 31, 1946.

[3] Although this statute originally applied only to wartime veterans, 38 U.S.C. § 1137 extends the presumption afforded in this statute to any veteran who served in the active military, naval, or air service after December 31, 1946.

In conclusion, the statutory benefit of the doubt standard; the statutorily mandated duty to assist; and the presence in the statutory scheme of many strong evidentiary presumptions in favor of the veteran's claim all suggest that it is consistent with Congress's overall intent that, when a court is in doubt about the meaning of a statute, it should interpret that statute in favor of the veteran, as mandated by this Court's decision in *Brown v. Gardner*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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